IN THE

Supreme Court of the United States

October Term, 1975

No. 75-733

LONG ISLAND LIGHTING COMPANY,

Petitioner,

against

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY and TEXACO OVERSEAS PETROLEUM COMPANY,

Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

against

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY and TEXACO OVERSEAS PETROLEUM COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is now reported at 521 F.2d 1269 (2d Cir. 1975). The opinion of the District Court for the Southern District of New York is reported at 390 F. Supp. 1172 (S.D.N.Y. 1975). The opinions appear as Exhibits A and B in the appendix to the Petition.

Jurisdiction

Petitioners seek to invoke the Court's jurisdiction under 28 U.S.C. §1254(1). Not mentioned by the Petition is the fact that there is pending in the District Court a further claim by each petitioner (Third Claim of the Long Island Lighting Company ("Lilco") complaint, A52;* Second Claim of the Consolidated Edison Company of New York, Inc. ("Con Edison") complaint, A73) seeking common law recovery for the same injuries asserted by the claim as to which certiorari is sought (First Claim of each complaint). When the District Court dismissed petitioners' antitrust claims, it determined pursuant to Rule 54(b), Fed. R. Civ. P.,** that there was no just reason for

* The citation "A" refers to the appendix to the Petition.

** Rule 54(b) provides:

"*Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not

(footnote continued on next page)

delaying the entry of final judgment as to the antitrust claims (A29). Since then, the Court of Appeals has remanded one of the antitrust claims, the Second Claim of the Lilco complaint, to the District Court. If Lilco prevails on that claim (establishing that the prices it was charged by its supplier, New England Petroleum Corporation ("Nepco"), were pursuant to a purported conspiracy between Nepco and defendants), Lilco will obtain the same antitrust recovery it seeks by the claim which is the subject of the Petition.* No further Rule 54(b) determination has been made since the remand, making any appellate involvement at this stage inappropriate, particularly with respect to petitioner Lilco. *E.g., Allis-Chalmers Corp.* v. *Philadelphia Elec. Co.*, 521 F.2d 360, 364 (3d Cir. 1975); *Panichella* v. *Pennsylvania R.R. Co.*, 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied*, 361 U.S. 932 (1960).

Questions Presented

Rule 23(1)(c) of the Rules of this Court directs that the questions presented for review be "expressed in the terms and circumstances of the case * * *." Two of the three Questions Presented by the Petition pose abstract inquiries which do not arise out of the terms and circumstances of this case and whose answer would not affect or alter the

terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

* It might be noted, additionally, that judicial notice has been taken of the fact that Lilco has a separate breach of contract suit pending against Nepco with respect to the same increase by Nepco of its prices to Lilco for which recovery is sought by all three of Lilco's claims in this action (A8n.2, 25, 28). If Lilco recovers from Nepco, it will have sustained no damage.

decision of the questions which this case in reality raises.* The remaining question misstates the case:

> "I. Whether the District Court and Court of Appeals on *motions* pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure *improperly granted summary judgment on the merits* of petitioners' antitrust claims by dismissing them for lack of standing to sue under Section 4 of the Clayton Act?" (Petition, p. 2; emphasis supplied).

It is not clear precisely how the Courts below *"improperly"* granted summary judgment since they didn't grant summary judgment at all. Nor are the various suggestions of impropriety sprinkled about the Petition enlightening, including:

a. That the District Court somehow erred by *declining* to convert the motion for failure to state a claim upon which relief may be granted into a summary judgment motion and by excluding matters outside the pleading (Petition, p. 13)—a choice which the Court had express discretion to make under Rule 12(b)(6) and to which plaintiffs explicitly consented at the time;

b. That the Court of Appeals was somehow mistaken in believing that the Lilco Second Claim differed from the First Claim (*id.* at 31n.)—although it was

* Viz.:

"II. Whether the conflict among the circuits on rules for determining who has standing to sue for antitrust violations should be resolved?

"III. Whether the Second Circuit's 'target area' standing test contradicts the settled construction of the antitrust laws established by this Court?" (Petition, p. 2).

Lilco which urged the difference upon the Court of Appeals and sought to be relieved of its acquiescence to the claims being treated alike in the District Court (A12-13); and

c. That the Courts somehow "effectively rewrote the complaints" (Petition, p. 13) or at least should have been "more careful" (*id.* at 19) in reading them—where it is the petitioners who find it appropriate to run from the complaints and, regrettably, to misrepresent their contents. (Thus, the Petition's purported description of the claim at issue, pp. 4-8, is devoid of reference to the complaints and instead is a hodge-podge of claimed quotations from excluded materials, misstatements, misleading innuendos and freshly-minted and false accusations nowhere to be found in the complaints.)

1. The Non-Existent Summary Judgment

A brief review of the proceedings is necessary to dispel some of the confusion generated by the Petition.

Three motions to dismiss the antitrust claims of the complaints were before the District Court: one, by defendant Standard Oil Company of California ("Socal"), involved the applicability of the United States antitrust laws to dealings with foreign governments acting in their sovereign capacity; another, by defendant Mobil Oil Corporation ("Mobil"), raised a similar issue, as well as other issues involving the Act of State doctrine and the right to protect property against illegal seizure. The third motion, jointly brought by all defendants (the only motion heard

and decided by the District Court), asserted that the material allegations of fact in the complaints disclosed on their face that plaintiffs were not the target of the purported antitrust wrongdoing and that any injury they may have sustained was indirect, far removed from defendants' allegedly illegal objective and not legally attributable to defendants. The Mobil motion had been supported by an affidavit, and plaintiffs responded with an affidavit of counsel and exhibits.

On the return date of the motions, the District Court suggested that the joint motion might be treated first because it involved only the face of the complaints and its disposition could moot the others (JA108-09).* The Court explained:

> "No affidavits are needed and certainly under the rule, they can be excluded. I therefore propose to exclude them and to consider the face of the complaint. Before I adopt this procedure, I want to give counsel a chance to be heard on the subject. Are there any objections or comments?" (JA109).

Petitioners' counsel expressly advised that they had no objection and requested only that the Court decide the joint motion promptly (JA110-11)—a request to which the District Court assented and with which it complied.

For petitioners to fail to advise this Court that the affidavits were excluded with their consent and for them to base their Petition upon the excluded materials and claim that the District Court erred in excluding them is, we submit, blatantly improper. As the Courts below made clear,

* "JA" refers to the Joint Appendix in the Court of Appeals.

their decisions were based solely on the complaints (A21, A5), as construed "in the light most favorable to the plaintiffs" (A8).*

2. The Purported "Inconsistency" in the Court of Appeals' Remand of the Second Claim

The District Court suggested at the hearing that, in the interest of simplicity, it might confine argument of the joint motion "and in writing any memorandum disposing of it" to the first claim in the Lilco complaint (JA111-12), since

> "the decision on the points raised by the joint motion as to this claim in the Lilco complaint will necessarily govern as to the second claim in that same complaint and as to the first claim in the Con Ed complaint" (JA112).

Again, the Court made clear that its proposal was subject to the consent of the parties:

> "Before I adopt that procedure, though, I will give counsel a chance to make any objections or comments. What do counsel say about that?
>
> "Mr. Handler: No objection, Your Honor.
>
> "The Court: Anybody have any objection to that?" (JA112).

None was voiced. Plaintiffs remained mute and the District Court then disposed of the Second Claim on the basis of its determination of the First.

* The Petition's repeated attempt to suggest that the Courts below resolved disputed questions of fact with respect to motive and intent contrary to *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962) (Petition, pp. 11, 19-20), is specious. All they did was accept the material factual allegations of the complaints as true for purposes of the motion—plaintiffs' own allegations, and not those of defendants.

On appeal, however, Lilco urged that its Second Claim "raises issues much different" from the First (Appellants' Brief in the Court of Appeals, p. 12). It persuaded the Court of Appeals to go to great lengths to rule that it was not "bound by counsel's acquiescence" (A13) and to find some basis upon which the Second Claim could survive dismissal on its face—*i.e.* if it should be found that Lilco's supplier, Nepco, was a member of the alleged conspiracy and not its victim (A15).

Having succeeded in the Court of Appeals by claiming the two counts were different, plaintiffs now flip-flop again and urge this Court that they are really the same (Petition, p. 31n.), as the District Court took them to be in the first place upon the consent of all parties.

This fast-and-loose approach permeates the entire Petition.

3. The Claimed Rewriting of the Complaints by the Courts

The basic thrust of the Petition is that the Courts below erred in reading the complaints to charge allegedly wrongful concerted action against Libya and other members of the Organization of Petroleum Exporting Countries ("OPEC"), rather than against these utility companies.

Thus, the Petition is emphatic:

> "The complaints *do not allege* that Libya or Saudi Arabia was the target of the conspiracy. *On the contrary*, the complaints allege that pursuant to an ongoing *conspiracy in effect since January, 1971*, a boycott was imposed by the oil companies on low sulphur oil destined for Lilco and Con Edison (¶¶22-3, 28, 37, A-39, 41, 44)" (Petition, p. 17; emphasis supplied).

There need be no dispute as to what the complaints allege. They are set forth in the appendix and they speak for themselves. When reference is made to the complaints' allegations with respect to the so-called conspiracy, one can only find the averments correctly summarized by the Courts below and not "the contrary" allegations now asserted by petitioners.*

Moreover, in contrast to their present assertion that the complaints do not allege that Libya or Saudi Arabia

* Thus, the very paragraphs cited by petitioners to support their view provide:

> "28. In January, 1971, SOCAL, TEXACO, MOBIL and most other free world oil companies with interests in OPEC countries, formed a committee known as the London Policy Group (LPG) to plan policy with respect to and to bargain jointly with OPEC countries, including Libya. The members of LPG agreed, among other things: (a) that no member of LPG would reach any agreement with an OPEC country without the consent of all LPG members and (b) that if an OPEC country took any action against any LPG member, *e.g.*, nationalization of all or part of its oil reserves in that country, the other members of LPG would supply oil to that company, at cost, to the extent of its losses resulting from that action.
>
> * * *
>
> "37. Thereafter, pursuant to an unlawful conspiracy *whose object was to protect their monopoly interest* and virtually complete control over all aspects of the production, transportation, refining and marketing of crude oil *in the Persian Gulf area*, SOCAL, TEXACO, MOBIL and JOHN DOES 1 through 10, embarked on a course of action designed to prevent NEPCO from dealing with the Libyan Government, from purchasing low sulphur crude oil from NOC, from transporting such low sulphur crude oil, from refining it and from distributing it to its customers, including LILCO" (A41-42, 44-45; emphasis supplied).

The only conspiratorial object alleged is to protect an asserted Persian Gulf monopoly, and the only reference to Lilco is as a customer of Nepco.

was the target of the conspiracy, plaintiffs' brief in the Court of Appeals proclaimed:

> "The complaints allege that the LPG majors concertedly closed down production of Libyan low sulphur oil in response to the nationalization of 51% of the concessions. Certainly, it was hoped that Libya would thereby reduce its participation demands and restore the oil companies' previous monopoly interest. *Hence, Libya was one target of the conspiracy. Without question, a second object of the joint boycott of Libyan oil was protection of the oil companies' shared monopoly interests in the Persian Gulf*" (p. 26; emphasis supplied).

Particularly illuminating in this regard are the proceedings before the District Court. At the oral argument there, plaintiffs acknowledged that their conclusory allegations that defendants conspired to monopolize and monopolized trade and commerce in low sulphur oil to be imported into the United States (A39) meant, as the complaints' factual allegations demonstrated, precisely the opposite—*i.e.*, that defendants ceased to deal in such oil (JA143-44). Rather than monopolization of any such market, plaintiffs explained, their claim of wrongdoing was that defendants withdrew from Libya when that country took 51% of their oil without their consent (JA138, 146) and that defendants subsequently tried unsuccessfully to get Libya to back away from its seizure of their property. According to plaintiffs, what made this a matter of antitrust concern was that defendants' conduct toward Libya was motivated by the desire to avert similar expropriation of their interests in the Persian Gulf.

When the Court inquired—

> "What was the object of the conspiracy? To get Lilco and Con Ed?" (JA145),

plaintiffs responded:

> "The object of the conspiracy as it came into full flower in mid-September or early September, 1973, was for the purpose of protecting its interest in the Persian Gulf, to boycott and to refuse to lift Libyan oil" (*id.*).

Plaintiffs explained that defendants were "willing to risk the losses" in Libya "because they had more fish to fry elsewhere in the world" (JA144)—in the Persian Gulf:

> "* * * they were determined to boycott, your Honor, and the reason they were determined to boycott was because nothing was more important to them than protecting their interest in the Persian Gulf and the east coast went by the boards" (JA142).

While Libya, according to plaintiffs, was important to the East Coast of the United States because of its low sulphur crude oil, "the Persian Gulf was the only thing on the minds of the defendants" (JA141).

The oral argument thus confirmed what the factual allegations of the complaints made clear—that plaintiff utilities patently were far removed from the claimed antitrust violations, requiring the grant of defendants' Rule 12 (b)(6) motion.*

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* In the Court of Appeals, petitioners suggested that the complaints charge defendants with a group boycott directed at them. The Court of Appeals dispositively rejected this belated attempt to read a claim into the complaints which is not to be found there:

> "LILCO and CON EDISON would have us surmount the standing hurdle by construing the first counts as if they alleged

(footnote continued on next page)

The District Court also found, as an alternative ground compelling dismissal, that there was an inadequate causal relationship between the violation alleged and the injuries claimed. It observed:

> "The complaint makes it clear that the cause of Lilco's injury (if any) was the increase by Nepco of its prices, an increase which Lilco says was an unjustified breach of contract and for which Lilco is suing. If Nepco's price increase was justified under the contract, then the justification was the increase by Libya of the purchase price to Nepco, an increase which was decided upon by Libya, a sovereign state over which defendants have no control. In any event, therefore, no 'causal connection', either 'clear' or otherwise, is shown between the claimed violations of defendants and the claimed injuries of Lilco" (A28).

The Court of Appeals found it unnecessary to pass upon the District Court's alternative ground because the first "holding adequately supports the judgment appealed from" (A11). Its opinion pointed out that neither Court had occasion to consider other tendered defenses.*

In sum, it is respectfully submitted that the Courts below in no wise rewrote the complaints. Comparison of their specific allegations shows the Courts' summaries to be entirely fair and accurate. Accordingly, it is respectfully submitted, there are no substantial issues worthy of review in the Petition.**

There Are No Reasons for Granting the Writ.

A. The Patent Insufficiency of the Petition

Rule 23(4) of the Rules of this Court provides that the "failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." It is respectfully submitted that this Petition fails on every score.

The foregoing discussion, we believe, makes it unnecessary to further burden the Court with a catalog of the Peti-

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a group boycott directed at them. For this they rely upon the allegation:

> 'After notification by NEPCO of the price increase, CON EDISON tried to obtain low sulphur residual oil from other sources. No major member of the LPG submitted an offer.' (CON EDISON Complaint ¶48; Joint App. at 39a).

However, this is not a group boycott allegation. It does not suggest that any defendant was actually asked for low sulphur residual oil, that any defendant actually refused to sell it, or that any action of the defendants with respect to the sale of low sulphur residual oil to LILCO or CON EDISON was taken in concert. At no time did the plaintiffs seek leave in the district court to amend their complaints. Nor did they urge upon the district court the contention that the quoted allegation should be read as a charge of a group boycott directed at them. Under these circumstances we decline to consider that theory as a basis for reversing the judgment appealed from" (A11-12).

No question presented by the Petition challenges this ruling.

* The Court noted that these

> "include the contention that the price increase was the result of an act of state by Libya (see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964)), and the contention that only the first purchaser from an antitrust violator may recover under the antitrust laws" (A11 n.12).

** Implicitly recognizing that if the Courts' descriptions of the complaints were accurate there could be no serious challenge to the conclusions drawn therefrom with respect to plaintiffs' remoteness from the claimed violation, plaintiffs have found it necessary to predicate the Petition upon the premise that the descriptions were inaccurate. With the failure of that premise, nothing of consequence remains.

tion's pervasive mischaracterizations of the complaints and rulings below, its improper interweaving of excluded materials and its failures to disclose.

B. Checking the Accuracy of Lower Courts' Readings of a Particular Complaint Is Not a Ground for Granting Certiorari

As discussed, the Petition is based on the contention, first, that

> "the District Court based its opinion on a number of factual determinations inconsistent with the allegations of the complaints, and on apparent factual misconstructions of the nature of the utilities' claims" (Petition, p. 13),

and, secondly, that the Court of Appeals likewise drew conclusions with respect to the facts which were not

> "justified by the wording or allegations of the complaints. * * *" (*id.* at 14).

The task petitioners would assign to this Court is that of assessing how well the Courts below read the complaints and whether they were guilty of factual misconstructions. It is respectfully submitted that this hardly comes within the considerations governing review on certiorari specified in this Court's Rule 19.

C. No Substantial Question With Respect to Standing to Sue Is Presented by This Case

Petitioners point to the fact that different rubrics have been used in the various Circuits in concluding, as the Court observed in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972):

> "that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."

They further urge that these differences have in the past led to inconsistent results in cases in which this Court declined to grant certiorari (Petition, p. 24). The Petition also engages in some hypothetical speculations as to how other Circuits might have assessed the unique facts here (*id.* at 25).

*What the Petition does not, and cannot, do is show any contrary holding in any case remotely resembling this one.** According to the complaints, as four Federal Judges have now unanimously read them,** all of defendants' allegedly wrongful conduct had as its anticompetitive objective the

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* *Malamud* v. *Sinclair Oil Corp.*, 1975 Trade Cases ¶60,442 (6th Cir. 1975) is not to the contrary. The Sixth Circuit specifically reaffirmed its decision in *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963), that a supplier could not recover damages based upon antitrust injury to its customers because "the supplier was too remote from the violation" (1975 Trade Cases at p. 66,950). *Malamud* took the view that absence of direct injury constituted a failure of a material element of an antitrust cause of action but drew a semantic distinction between that and "standing" which it defined narrowly as confined to the minimum requirements of Article III (*id.* at p. 66,949). Needless to say, as the Sixth Circuit recognized, the absence of a material element of a cause of action, including remoteness of injury, may be determined by preliminary motion (*id.* at n.13).

** The Court of Appeals succinctly explained:

> "Thus construing the complaint in the light most favorable to the plaintiffs, the first count charges that the defendants, motivated by their interest in strengthening their position in dealing with Saudi Arabia, organized a group boycott against Libyan oil in an effort to dissuade the Libyan government from nationalizing 51% of their oil concessions; that pursuing the boycott of Libyan oil they stopped delivering it to NEPCO; that NEPCO obtained it directly from NOC at higher prices, and that LILCO and CON EDISON were forced to pay these higher prices" (A8-9).

retention of what plaintiffs claim was a monopoly position in the Persian Gulf. For the sake of the Persian Gulf, defendants assertedly were willing to jeopardize their rights in Libya with the result that Libya sold low sulphur crude oil to whomever wanted to buy it and at whatever terms were concluded by the parties. The complaints do not suggest that such sales by Libya were anticompetitive. Rather, the theory of the complaints is that defendants should not be allowed to risk further loss of their Libyan crude oil business (by resisting the seizure of 51% of it) in order to preserve an allegedly wrongful situation in the Persian Gulf from similar nationalization.

Plaintiffs, however, do not claim to have been injured by any competitive situation in the Persian Gulf—the area where the alleged monopoly supposedly was being maintained and where the *anticompetitive effect* of defendants' conduct allegedly existed. Not only are petitioners not engaged in the area of the economy where the asserted violation occurred, but the complaints contain no allegation that plaintiffs at any time purchased any low sulphur residual fuel oil refined from Persian Gulf crude, either from Nepco or anybody else. Plaintiffs make no pretense that the competitive situation in the Persian Gulf was of any concern to them.

Nor do plaintiffs claim that defendants' conduct required Libya to increase its prices. They merely allege that defendants tried to make it difficult for Libya to sell the oil it nationalized. Although experience and logic suggest that a victim of a boycott, as Libya is claimed to be, will tend to reduce prices to attract patronage rather than raise

them and run the risk of losing its remaining customers, plaintiffs allege that Libya chose instead to raise its prices to Nepco. The complaints do not claim that Libya's decision to do so (as part of OPEC-wide price increases) was not its own and entirely independent of defendants, nor that Nepco's subsequent decision to raise its prices to plaintiffs (which is the subject of a breach of contract suit by Lilco against Nepco) was not also its own and entirely independent of defendants. Yet, although there is no allegation that defendants benefitted in any way from Nepco's prices to the plaintiffs or Libya's prices to Nepco, plaintiffs seek to have the defendants give them threefold the OPEC price increase —all because of the claim that defendants concertedly resisted rather than acquiesced in the OPEC takeover demands.

There is simply no test in any Circuit which would permit antitrust recovery for claims which are so far removed from the alleged conspiracy.*

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* Petitioners' attempt to raise a question with respect to the Second Circuit's "target area" standing test is also idle in the context of this case (Petition, p. 31). Thus, where *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972), presented a clear case of someone with immediate and foreseeable injury denied standing because the injury was indirect or incidental to the violation, in the present case plaintiffs' alleged injuries are many steps removed from the allegedly wrongful conduct against Libya and other OPEC countries which their complaints assert.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Dated: December 18, 1975

Respectfully submitted,

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